Docket No.: 9189 (A-947C) 01017/40451C

## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:	

Brockhaus et al.

Application No.: 08/444,791 Art Unit: 1644

Filed: May 19, 1995 Examiner: R. Schwadron

For: HUMAN TNF RECEPTOR

# DECLARATION OF STEWART LYMAN, PH.D. UNDER 37 C.F.R 1.132

- I received a Ph.D. in Oncology from the McArdle Laboratory for Cancer Research at the University of Wisconsin-Madison in 1984. I did postdoctoral research at the Fred Hutchinson Cancer Research Center in Seattle, and joined Immunex Corporation as a molecular biologist in 1988. I was a scientist at Immunex Corporation for 14 years, eventually becoming Director of Extramural Research. After Amgen acquired Immunex in 2002, I stayed on and worked for Amgen for three months in a transitional role. Since 2004, I have managed my own consulting business, and I am being compensated for my time consulting on this matter at my usual hourly rate. I also own 100 shares of Amgen stock. My Curriculum Vitae is attached as Exhibit A.
- I have reviewed the above-identified application as originally filed. I have been informed that the effective filing date of the above-identified application is August 31, 1990. In particular I have reviewed page 9, line 19 to page 10, line 10 of the application, which refers to Smith et al, Science 248: 1019-1023, 1990 (referred to hereafter as "Smith (1990)"):

In addition thereto, the present invention is also concerned with DNA sequences coding for proteins and soluble or non-soluble fragments thereof, which bind TNF. Thereunder there are to be understood, for example, DNA sequences coding for non-soluble proteins or soluble as well as non-soluble fragments thereof, which bind TNF, such DNA sequences being selected from the following:

- (a) DNA sequences as given Figure 1 or Figure 4 as well as their complementary strands, or those which include these sequences;
- (b) DNA sequences which hybridize with sequences defined under (a) or fragments thereof;
- (c) DNA sequences which, because of the degeneracy of the genetic code, do not hybridize with sequences as defined under (a) and (b), but which code for polypeptides having exactly the same amino acid sequence.

That is to say, the present invention embraces not only allelic variants, but also those DNA sequences which result from deletions, substitutions and additions from one or more nucleotides of the sequences given in Figure 1 or Figure 4, whereby in the case of the proteins coded thereby there come into consideration, just as before, TNP-BP [TNF binding proteins]. One sequence which results from such a deletion is described, for example, in [Smith et al.,] Science 248, 1019-1023, (1990).

- 3. I have been informed that the Patent Office has objected to the amendment to the specification which inserts the phrase "incorporated by reference" with respect to the sequence provided in Smith (1990), because this insertion introduces new matter into the application. I have reviewed page 2 of the Office Action dated June 8, 2010 which sets out this objection and make this declaration to address the objection.
- 4. I have been informed that the standard for properly incorporating material by reference into a patent application is that the application clearly identifies the reference publication and the application must clearly convey an intent to incorporate the material by reference.

5. I believe that I am qualified by my education and training to attest to what one skilled in the art would have understood from reading the application as of August 31, 1990. In 1990, I was well experienced in the molecular biology of type I transmembrane receptors. For example, we had recently cloned and expressed the c-kit tyrosine kinase recentor protein, a tyne I transmembrane recentor (Williams et al., Cell, 63, 167-174,1990). In addition, I had worked on elucidating the relationship between the IL-4 receptor (also a type I transmembrane receptor) and other cytokine receptors. (Cosman et al., Trends in Biol. Sci. 15:265-270, 1990) The extracellular, ligand-binding domain of the IL-4 receptor showed homology to several other cytokine receptors. This homology allowed us to define a new class of cytokine receptors. Starting in 1988, I also initiated a project at Immunex that resulted in the cloning of a number of cell surface receptors and their ligands. During the course of this work, I had occasion to make DNA constructs encoding soluble forms of type I transmembrane receptors (i.e., not membrane bound) as well as insoluble chimeric receptors containing the extracellular domain of one receptor fused to the transmembrane and cytoplasmic domains of a different receptor.

6. I note the following points as background to the discussion below. I read the application as being concerned with two tumor necrosis factor binding proteins ("TNF-BP"), one about 55 kD in size and one about 75 kD in size. The application's discussion of these two TNF binding proteins is consistent with what was known in the art as of August 31, 1990, i.e. that there were two membrane bound TNF receptors (TNFR) of approximately these sizes. The former is also

variously referenced in the literature as TNFR I, 55 kd TNFR, or p55 TNFR. The latter is also variously referenced in the literature as TNFR II, 75 kd TNFR, or p80 TNFR.

- Figure 4 of the application displays a partial nucleotide and amino acid sequence corresponding to the p75 TNFR.
- 8. There is a description in the application of the specific full length sequence of the 75 kD TNFR. It is clear from the citation to the Smith (1990) article at page 10, lines 9-10 of the application that the Applicants knew of the Smith (1990) article when they drafted the application and intended to refer to its sequence.
- 9. It is disclosed in the application (page 35, lines 22-33) that Figure 4 is a partial cDNA sequence. Since the amino acid sequence of Figure 4 is almost identical (almost 99% identical) to that of Smith (1990), it would be clear to one of skill in the art that the sequence of Figure 4 was a partial sequence of the same protein described in Smith (1990). Attached as Exhibit B is an alignment of the Figure 4 sequence with part of the Smith (1990) sequence of p75 TNFR to illustrate this point. Further, the disclosure (page 33, lines 7-19) of the following 18-mer as the amino terminal peptide of a protein detected as a 65/75 kD band was also consistent with this conclusion because the 18-mer matches exactly the mature amino terminus of p75 as disclosed in Smith (1990), save for one amino acid, the identity of which was not determined:

Leu-Pro-Ala-Gln-Val-Ala-Phe-X-Pro-Tyr-Ala-Pro-Glu-Pro-Gly-Ser-Thr-Cys.

When the entirety of the quote in paragraph 2 above is read, one sees that the paragraph refers to soluble and non-soluble fragments of TNF binding proteins,

10.

i.e. the TNF receptors described in the application. Thus, one of skill in the art would have concluded that the citation to Smith (1990) was a reference to whatever soluble or non-soluble fragments of TNF binding proteins were described in the article. Despite differences between the sequences disclosed in the application and those in the Smith (1990) article, the amino acid sequences are nearly 99% identical overall. I would interpret the quote in paragraph 2 above to mean that the Smith sequence was contemplated by the inventors because the Smith (1990) article is specifically cited.

11. One of skill in the art would not have read the application by itself without reference to any other known information. Instead, such a person would have read the application in view of what was known in the art at the effective filing date, particularly in view of the following statements in the application:

"the present invention embraces . . . One sequence which results from such a deletion is described, for example, in [Smith et al.,] Science 248, 1019-1023, (1990)."

Specification, page 10, lines 3-10. One of skill in the art would also have noted that Dembic et al. Cytokine 2(4): 231-7, 1990, published by the same authors as the inventors on the application, disclosed the entire sequence of the mature 75 kD TNFR, which was the same sequence as in Smith (1990), and the same extracellular region (page 232 to page 233, upper left column; and Figure 1 at page 232). Thus, one of skill in the art would have had no doubt that the inventors were in possession of the entire p75 sequence as of August 31, 1990 and that the Applicants clearly intended to incorporate the entire p75 amino acid sequence into the specification.

12. For all of these reasons, it is clearly indicated in the specification that the skilled artisan should look to the Smith (1990) article as a source of information about sequences of soluble fragments of the TNF-BP that can be used.

- 13. The citation includes the journal name, journal volume, page numbers and year, and thus is a complete citation that uniquely identifies the article. Figure 3 of Smith (1990) discloses the only TNF receptor sequence in this publication, from among the p55 or p75 TNF receptors that are the subject of the application. Thus, the application clearly identifies the reference publication and the application clearly conveys an intent to incorporate by reference the sequences in Smith (1990) of soluble or non-soluble TNF receptors.
- 14. I further declare that all statements made herein of my own knowledge are true. that all statements made on information and belief are believed to be true, and that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both (18 U.S.C. § 1001), and may jeopardize the validity of the application or any patent issuing thereon.

Dated: Sept. 3, 2010 Stewn Tyman

## EXHIBIT A

#### CURRICULUM VITAE

NAME: Stewart David Lyman

PRESENT POSITION: Manager, Lyman BioPharma Consulting LLC

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PLACE OF BIRTH: New Rochelle, NY

EDUCATION:

Ph.D.

<u>Degree</u> <u>Institution</u> <u>Discipline</u>

B.S. State University of Biology

(Magna cum laude) New York at Albany, Albany, NY

McArdle Laboratory for Cancer Research University of Wisconsin

Madison, WI

Dissertation: "Genetic and Metabolic Factors that May Affect the Biological

Activity of Xenobiotics in Mice"

## EMPLOYMENT HISTORY:

2003 - present: Manager, Lyman BioPharma Consulting LLC

1988-2002: Immunex Corporation:

1999-2002: Director, Extramural Research

1993-1999: Senior Staff Scientist

1988-1992: Staff Scientist

Project Chair, creator of the Receptors in Search of Ligands (RISOL) Project, 1989-

Oncology

1994. Receptors used as tools to clone novel ligands.

Project Chair of the Signal Transduction Project, 1990-1991.

Project Chair of the Flt3 Ligand Development Project, 1994-1996. Project Co-Chair of the Expressed Sequence Tag Project, 1995-1996.

Project Co-Chair of the Core Pipeline Technology Project, 1997-1999.

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Project Co-Chair of the Basic Biology Project, 1999.

1984-1988: Post-doctoral Fellow: Fred Hutchinson Cancer Research Center, Seattle, WA. Laboratory of Dr. Larry Rohrschneider. Studied the mechanism of cellular transformation by the v-fms oncogene.

## PROFESSIONAL ASSOCIATIONS:

American Association for the Advancement of Science

## RESEARCH INTERESTS:

Identification of novel growth factors; role of growth factors in development of the

hematopoietic and immune systems, role of growth factors in oncology.

## HONORS AND AWARDS:

Regents Scholarship, SUNY Albany, 1973-1977

Biological Honor Society, SUNY Albany, 1976-1977

Danforth Fellowship nominee, SUNY Albany, 1977

U.S. Public Health Service National Research Service Award

McArdle Laboratory for Cancer Research, 1977-1982

NIH Postdoctoral Training Grant in Viral Oncology

University of Washington, January-September 1985

Individual National Research Service Award.

National Cancer Institute October 1985-December 1987

Visiting Scientist Fellowship, Molecular Biology Computer Research

Resource, Dana-Farber Cancer Institute, Boston, MA; December 1986

#### ADVISORY BOARDS:

Advisory Board Member "Modern Drug Discovery", 1998 - 2004.

# AWARDED PATENTS AND PATENT APPLICATION FILINGS:

- U.S. Patent #5,512,457 Cytokine designated Elk ligand
- U.S. Patent #5,627,267 Cytokine designated Elk ligand
- U.S. Patent #5,670,625 Elk ligand fusion proteins U.S. Patent #5,728,813 – Antibodies directed against Elk ligand
- U.S. Patent #5,554,512 Ligands for Flt3 receptors
- U.S. Patent #5,843,423 Flt3 ligand stimulation of hematopoietic cells
- U.S. Patent #6,190,655 Flt3 ligand uses for exogenous gene transfer
- U.S. Patent #6,540,992 Methods for using elk-L to enhance neuronal survival
- U.S. Patent #6,555,520 Human TSLP DNA and polypentides
- U.S. Patent #6,630,143 Antibodies against flt3 ligand
- U.S. Patent #6,632,424 Human flt3 ligand
- U.S. Patent #6,762,030 Ligand for CD7, and methods for use thereof
- U.S. Patent #6,919,206 Medium containing flt3 ligand for culturing hematopoietic cells
- U.S. Patent #6,994,989 FLK-1 binding proteins
- U.S. Patent #7.041,282 Ligands for flt3 receptors U.S. Patent #7,045,128 - Antibodies against flt3 ligand

WO 92/00376 - The c-kit ligand (Steel factor)

WO 97/17442 - Novel VEGF related ligand for flk-1/KDR receptor

WO 99/33984 – V197 Polypeptide WO 99/33983 – V201 Polypeptide WO 99/33877 – V196 Polypeptide

## INVITED TALKS AT MEETINGS:

Biology of IL-4 Receptor:

FASEB conference on Receptors, June 1990

Biotechnological Applications in the 1990's, UC-Irvine, Irvine, CA, May 1990

#### Biology of Steel Factor (c-kit Ligand):

Armand Hammer Workshop: Regulation of Hematopoietic Stem Cells, La Jolla, CA, October 1990

Nargis Dutt Memorial Symposium: Cytokines in Clinical Medicine, UC-Irvine, Irvine CA October 1990

Stromal Regulation of Hematopoiesis, Bethesda, MD, June 1991

Blood Cell Growth Factors Meeting, Beijing, China, August 1991

American Society for Pediatric Hematology/Oncology, Chicago IL, September 1991

AACR 43rd Annual Symposium on Fundamental Cancer Research: "Growth Factors and their Receptors in Cancer: Basic Mechanisms and Therapy" Houston, Texas, November 1991

#### Biology of Flt3 Ligand:

Plenary Session, 1993 ASH meeting, St. Louis, MO. December, 1993

Keystone Hematopoiesis Conference, Breckenridge, CO January, 1994

Advances in Bone Marrow Transplantation, Valhalla, NY March 7, 1994

Advances in Hematopoiesis Conference, Tokyo, Japan July 1994

The Metcalf Forum: Polyfunctionality of Hematopoietic Regulators, Dublin, Ireland September 1994

Mehdi Tavissoli Memorial Symposium: Hematopoietic Stem Cells, Reno, Nevada, November 1994 Taniguchi Foundation Symposium: Regulation of Hematopoietic Stem Cells, Osaka, Japan, December 1994

9th Symposium, Molecular Biology of Hematopoiesis, Genoa, Italy, June 24-27, 1995

International Society for Experimental Hematology, Dusseldorf, Germany, August 26-31, 1995

International Symposium on Bone Marrow Transplantation: Basic and Clinical Studies, Tokyo, Japan, October 9-10, 1995

American Association for Cancer Research Satellite Symposium: Cytokines and Cytokine Receptors, Lake George, NY, October 1995

Southern Blood Club, New Orleans, LA, February 1, 1996

Wilsede Conference, Human Leukemia Meeting, Hamburg, Germany, June 14-18, 1996

Research Trends in Hematopoietic Cell Culture, Tokyo, Japan, August 26-28, 1996

Biological Therapy of Cancer, Munich, Germany, June 11-14, 1997

IBC conference "Hematopoietic Stem Cells" San Diego, CA, June 23-24, 1997

International Society for Experimental Hematology, Cannes, France, August 24-28, 1997

Mini-symposium: Tyrosine kinase receptors, University of Lund, Sweden, August 29, 1997

## PUBLICATIONS (Abstracts not included):

 Lyman, S.D., Poland, A., and Taylor, B.A. Genetic polymorphism of microsomal epoxide hydrolase activity in the mouse. J. Biol. Chem. 255, 8650-8654, 1980.

 Lyman, S.D., and Poland, A. Effect of the brachymorphic trait in mice on xenobiotic sulfate ester formation. Biochem. Pharm. 32, 3345-3350, 1983.

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 Murphy, M., Reid, K., Williams, D. E., Lyman, S. D., and Bartlett, P. F. Steel factor is required for maintenance, but not differentiation, of melanocyte precursors in the neural crest. Developmental Biology. 133, 396-401, 1992.

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- Lyman, S.D., James, L., Sleath, P.R., Zappone, J., Beckmann, M.P., and Bird, T. Characterization of the protein encoded by the flt3(flk2) receptor-like tyrosine kinase gene. Oncogene 8, 815-822, 1993.
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## EXHIBIT B

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to: p75-EP939121 check: 2507 from: 1 to: 392
p75(EP939121)
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